

Essay

Toward a Science of Torture?

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Does torture “work?” Proponents, including President Trump and the architects of CIA “Enhanced Interrogation” say it does, by breaking terrorists’ resistance to revealing information that saves lives. Torture’s foes typically dismiss this claim as false to the point of fraud—fortuitous coincidence with torture’s unlawfulness. Neither view, I argue herein, rests firmly on evidence. Rival anecdotes, not data, have, so far, driven this debate. And a scientific answer is beyond our reach, since: (1) rigorous comparison between interrogation methods that do and don’t involve torture isn’t possible, and (2) studies of this sort would be transparently unethical. This hasn’t stopped the CIA from pursuing a research-based answer. Recently released documents, reviewed here for the first time, reveal that the Agency looked to science for a resolution and raise the explosive possibility that the CIA conducted a clandestine program of human-subjects research on the risks and efficacy of torture. What can be said, based on the available science, is that there’s no evidence that torture is more effective than lawful interrogation and some reason to suspect that interviewing strategies grounded in state-of-the-art understandings of persuasion and cognition work best of all. What can also be said is that: (1) America’s post-9/11 torture program wrecked lives, and (2) torture has wide appeal, as symbolic riposte to the powerlessness many feel in the face of vertiginous economic and cultural change.

“Torture works,” President Trump said repeatedly at campaign events last year.¹ “Believe me, it works.”² Torture’s opponents insist otherwise. They mean, of course, not that torture doesn’t “succeed” at traumatizing souls but that it does no better than lawful interrogation methods at obtaining information for the purpose of preventing terrorist violence.³ For political

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1. Vanessa Schipani, *Trump on Torture*, FACTCHECK.ORG (July 28, 2016), <http://www.factcheck.org/2016/07/trump-torture/> [http://perma.cc/5ADY-H24A].

2. *Id.*

3. As the U.N.’s Committee Against Torture (CAT)—which oversees implementation of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment—recognizes, torture can have other purposes. The convention defines torture as “severe pain or suffering, whether physical or mental, . . . intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a

liberals, this is fortuitously coincident with torture's repugnance. More than that, it pushes back against portrayals of progressives as faint-hearted: it sounds more tough-minded to say torture doesn't "work" than to say torture is wrong because it is cruel.

This matters since tough-mindedness carries rhetorical advantage. Unwillingness to traumatize terror suspects out of concern for their rights and dignity is *de rigueur* among progressives but weak-kneed to many others. Most Americans support torture, at least in some circumstances. A March 2016 Reuters/Ipsos poll found that 63% of Americans think torture of terror suspects is "often" or "sometimes" justified.⁴ A series of ten Pew surveys conducted from 2004 to 2011 yielded similar results. Asked whether "torture [can] be justified against suspected terrorists to gain important information," only a quarter to a third of respondents said "never."⁵ The Republican Party's 2012 presidential nominee endorsed "enhanced interrogation," albeit insisting it isn't torture.⁶ The party's 2016 nominee dropped all pretense and prevailed, promising "the torture," including waterboarding and "a hell of a lot worse," and vowing to "expand the laws" to allow it.⁷ That "the laws" against torture are *jus cogens* (international principles that cannot be set aside by one country)⁸ and that torture of captives is a war crime⁹ have been little-noted during election seasons. In our politics, torture has become a trope for toughness and moral qualms about it, a sign of weakness.

So the more muscular proposition that torture doesn't "work" to stop the bad guys has moved to the fore as an argument against it. For a dozen years, since the details of the Bush Administration's post-9/11 Enhanced

third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind." Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1, Dec. 10, 1984, 1465 U.N.T.S. 85.

4. See Chris Kahn, *Exclusive: Most Americans Support Torture Against Terror Suspects - Reuters/Ipsos Poll*, REUTERS: POLITICS (Mar. 30, 2016), <http://www.reuters.com/article/us-usa-election-torture-exclusive-idUSKCN0WW0Y3> [<https://perma.cc/6XZF-MECV>] (reporting that almost 25% of respondents answered "often" and another 38% answered "sometimes").

5. DAVID LUBAN, *TORTURE, POWER, AND LAW* 301 (2014). Between 43% and 53% of respondents answered "often" or "sometimes" over the course of the ten surveys; 17% to 25% said "rarely," and 2% to 5% answered "don't know." *Id.*

6. See Charlie Savage, *Election to Decide Future Interrogation Methods in Terrorism Cases*, N.Y. TIMES (Sept. 27, 2012), <http://www.nytimes.com/2012/09/28/us/politics/election-will-decide-future-of-interrogation-methods-for-terrorism-suspects.html> [<https://perma.cc/5MFN-FVF2>] (noting that Mitt Romney's advisors urged him to permit "enhanced interrogation techniques" they characterized as "safe, legal and effective").

7. Steve Inskeep, *Listen: Trump Foreign Policy Adviser Hopes to Talk Him Out of Torture*, NPR: POLITICS (Mar. 23, 2016), <http://www.npr.org/2016/03/23/471543396/trump-taps-former-romney-campaign-foreign-policy-adviser-for-team> [<https://perma.cc/F5LS-APJK>].

8. *E.g.*, *Sideman de Blake v. Republic of Arg.*, 965 F.2d 699, 714, 716 (9th Cir. 1992).

9. See, *e.g.*, Updated Statute of the International Criminal Tribunal for the Former Yugoslavia art. 2, Sept. 2009 (noting that "torture or inhuman treatment" of captives constitutes a "grave breach" of the Geneva Conventions of 1949).

Interrogation program began to emerge, a battle of invective has played out over whether the program saved lives—and, more generally, whether abuse rising to the level of torture can extract “actionable intelligence.” Can science give an answer? We look to empirical methods to measure the efficacy of myriad interventions, from medical tests and treatments to capital punishment as a deterrent to murder. Shouldn’t the question of torture be similarly amenable?

I. Beyond Straw Men: The CIA’s Behavioral Science Model of Torture

A bevy of psychologists, brain scientists, and others say it is—and that they’ve answered it decisively. A 2015 book by neuroscientist Shane O’Mara, titled *Why Torture Doesn’t Work*, pulls together a large body of research on the effects of sleep deprivation, simulated drowning, and other abuses on the mind and brain.¹⁰ With the exception of a series of studies on U.S. soldiers who underwent mock torture as part of survival and resistance training,¹¹ the subjects of this research weren’t put through anything resembling enhanced interrogation; rather, they were patients, college students, and others who volunteered for brain scans, psychological testing, and experimental exposure to mild sleep deprivation, pain, or other stressors.¹² O’Mara also assembles animal studies of the neurobiology of stress, including prolonged sleeplessness, solitude, cramped confinement, and exposure to extreme temperatures.¹³ He ties this work together with current understandings of the biology of fear, anger, isolation, and exhaustion.¹⁴ All this adds up to a powerful argument for torture’s destructive effect on memory, recall,¹⁵ and ability to construct coherent narratives of remembered events—capabilities critical for effective interrogation.

10. See generally SHANE O’MARA, *WHY TORTURE DOESN’T WORK: THE NEUROSCIENCE OF INTERROGATION* (2015).

11. See *id.* at 127–30 (chronicling studies on military personnel).

12. E.g., *id.* at 133–34 (sensory-deprivation study on volunteers); *id.* at 158 (sleep-deprivation study on volunteers); *id.* at 192–93 (temperature-manipulation study on volunteers); see also *id.* at 159 (“Contrary to the thinly researched and poorly discussed impression provided by the memos, there was available a large and extensive literature about sleep deprivation in healthy volunteers, in chronic insomniacs, and in shift workers and other occupational groups.”).

13. *Id.* at 125, 135, 161 (noting that “severe, chronic, repeated stressor[s], irrespective of [their] origin[s] . . . inhibits the production of new brain cells . . . in just about every animal model of stress and also in models of depression”).

14. See generally, e.g., *id.* at 105–15 (explaining the biological effects of stress, fear, and pain caused by torture).

15. Memory and recall are different things; the former refers to storage of information, and the latter refers to the mind’s ability to access stored information. *Memory*, *ENCYCLOPÆDIA BRITANNICA*, <https://www.britannica.com/topic/memory-psychology> [<https://perma.cc/6J5J-GHVA>]; *Recall*, *ENCYCLOPÆDIA BRITANNICA*, <https://www.britannica.com/topic/recall-memory> [<https://perma.cc/3TET-K8NM>].

But does this argument establish that torture doesn't "work"? Torturers don't aver that their efforts help people to remember; rather, their claim is that harsh methods overcome captives' resistance to sharing what they know.¹⁶ If greater *willingness* to answer questions truthfully more than makes up for diminished cognitive functioning, then the science O'Mara marshals is beside the point: reduced resistance, achieved through torture, can yield positive intelligence results. Those who invoke this science to rebut claims that torture "works" must show that the damage it does to memory and recall outweighs any purported gains from torture's overcoming of detainees' resistance.

So does torture overcome captives' resistance to revealing useful information? More precisely, what advantages, if any, does torture offer over lawful interrogation methods as a way to surmount resistance? Opponents of torture usually insist it offers none.

They typically portray the torturer's craft as the overpowering of people through force and fear; this, they contend, is less effective than building relationships with interviewees, as seasoned law enforcement and military interrogators have traditionally done.¹⁷ These strategies, they note, are hardly warm and fuzzy—they rely on shame and embarrassment as much as empathy—but they're powered by human connection and the mutual expectations it engenders.¹⁸ Intimidation through force and fear shatters this connection, the argument goes. More than that, it stiffens subjects' resistance by arousing their ire.

Torture as intimidation—imposition of interrogators' will upon their captives—is a pop culture meme, from "Jack Bauer" in the Fox television series *24* to the waterboarding scene in the film *Zero Dark Thirty*.¹⁹ It likewise prevails in scholarly discussion. Consider, for example, the legal philosopher David Luban's definition of torture as "the assertion of unlimited power over absolute helplessness, communicated through the infliction of

16. See Mark A. Costanzo & Ellen Gerrity, *The Effects and Effectiveness of Using Torture as an Interrogation Device: Using Research to Inform the Policy Debate*, 3 SOC. ISSUES & POL'Y REV. 179, 198 (2009) ("[T]orture is designed to . . . break the resistance of an enemy.").

17. See Jonathan P. Vallano et al., *Rapport-Building During Witness and Suspect Interviews: A Survey of Law Enforcement*, 29 APPLIED COGNITIVE PSYCHOL. 369, 370 (2015) (discussing the prominence and recognized effectiveness of rapport-building among law enforcement interviewers).

18. See Jonathan P. Vallano & Nadja Schreiber Compo, *Rapport-Building with Cooperative Witnesses and Criminal Suspects: A Theoretical and Empirical Review*, 21 PSYCHOL. PUB. POL'Y & L. 85, 86 (2015) (noting that, in contrast to literature on rapport-building in the therapeutic or interviewing contexts, "recent interrogation literature has conceptualized rapport-building as . . . not necessarily involv[ing] a positive relationship. . . . This conceptualization is also consistent with the Army Field Manual, which states that 'rapport-building does not necessarily equate to a friendly atmosphere', as well as the Reid Technique, which implies that rapport involves cultivating a relationship by any means necessary to procure a confession." (internal citations omitted)).

19. *24* (Fox television broadcast 2001–2010); *ZERO DARK THIRTY* (Annapurna Pictures 2012).

severe pain or suffering on the victim that the victim is meant to understand as the display of the torturer's limitless power and the victim's absolute helplessness."²⁰

But this isn't what *America's* torturers—the designers of the CIA's Enhanced Interrogation program—had in mind. To the contrary, the program's chief architect, psychologist James Mitchell, warned against allowing interrogation to devolve into a "battle of wills"²¹ between interrogator and captive. In a March 2016 e-mail to me, former CIA Behavioral Sciences Chief Kirk Hubbard (who managed Mitchell during the program's early years and still passionately defends it) wrote, "I remember many years ago Jim Mitchell telling me that 'torture' doesn't work (I was thinking a cordless drill with a 3/8" bit!)."²² Mitchell *agreed* with critics of the "Jack Bauer" model—raw intimidation—that it often stiffens resistance to interrogation by stirring detainees' fighting spirits.

Mitchell, Hubbard, and CIA leaders who embraced their approach had another, very different model in mind. Much has been made of Mitchell's reliance on psychologist Martin Seligman's theory of "learned helplessness,"²³ but the more important influence was CIA, Air Force, and Army research in the 1950s into how Chinese interrogators obtained false "confessions" from captured U.S. airmen during the Korean War.²⁴ Work by sociologist Albert Biderman, in particular, was the foundation for Mitchell's model. Drawing on access to "former Chinese and Soviet interrogators, ex-POWs, and still-classified sources," Biderman and others sought to reconstruct the methods the Chinese used and to understand how and why they worked.²⁵

At the heart of the methods' effectiveness, Biderman found, was avoidance of a contest of endurance between interrogator and captive. Rather than trying to impose their will upon prisoners by inflicting agony face-to-face, interrogators sought to pit each prisoner against himself—to force an "internal" struggle that the prisoner was bound to lose.²⁶ Techniques like forced standing in awkward positions that became excruciating over time averted *mano-a-mano* contests between torturer and captive. "The

20. LUBAN, *supra* note 5, at 128.

21. S. REP. NO. 113-288, at 166 n.1016 (2014).

22. E-mail from Kirk Hubbard, former Behavioral Scis. Chief, CIA, to author (Mar. 30, 2016) (on file with author).

23. See, e.g., JANE MAYER, *THE DARK SIDE* 163–64 (2008) (describing the centrality of Seligman's work to Mitchell's thinking and his application of learned helplessness principles during his time with the CIA).

24. See M. GREGG BLOCHE, *THE HIPPOCRATIC MYTH: WHY DOCTORS ARE UNDER PRESSURE TO RATION CARE, PRACTICE POLITICS, AND COMPROMISE THEIR PROMISE TO HEAL* 122–37 (2011) (explaining CIA and Defense Department research into Soviet and Chinese prisoner interrogation in the wake of the Korean War and its impact on Mitchell's work).

25. *Id.* at 122–25.

26. *Id.* at 124.

immediate source of pain,” Biderman concluded, “is not the interrogator but the victim himself.”²⁷ The purpose of this suffering—this *losing*—was to dispirit the victim to a breaking point.

Total command of each captive’s environment hastened the onset of hopelessness. Control of bathroom breaks and body positioning, prolonged isolation, confinement in tiny spaces, and extended darkness or bright light created what Biderman called “monopolization of perception.”²⁸ “Sleep deprivation, loud noise, frigid temperatures, and disruption of . . . routines” further wore prisoners down.²⁹ “Small gestures of contempt—facial slaps and frequent insults—humiliated them.”³⁰ The end result, sometimes within weeks, was despair.³¹

This set the stage, Biderman argued, for the next phase: motivating these psychologically defeated captives to believe and act as their captors wanted.³² To this end, the Chinese relied on rapport as much as fear—a psychological dynamic much different than the “Jack Bauer” model of torture. The interrogator became the captive’s “sole human connection, with monopoly power to praise, punish, coax, scold, and reward,” so as to sculpt behavior and belief.³³ This, rather than raw intimidation, Biderman concluded, drove American POWs to confess to purported crimes and political errors.³⁴

Mitchell seized on this analysis as the foundation for his “enhanced interrogation” model. Early critics, including me, pointed out the seeming absurdity of seeking accurate information via the method our enemies used to extract false confessions.³⁵ But we neglected a key nuance in the Biderman analysis: his distinction between “inducing” and “shaping” compliance.³⁶ The first phase—the “internal” struggle, “monopolization of perception,” and

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 124–25.

33. *Id.* at 124.

34. *See id.* (observing that Chinese and Soviet interrogation techniques “avoided face-to-face contests of physical endurance between [interrogators] and the men they tried to break[, i]nstead . . . set[ting the] men against themselves”). These methods were less than fully successful at effecting long-term changes in political views, leaving some former POWs confused and conflicted about what they believed—and emotionally troubled as a consequence of both this confusion and the psychological trauma they experienced. *See generally* ROBERT JAY LIFTON, *THOUGHT REFORM AND THE PSYCHOLOGY OF TOTALISM* (1961) (evaluating the effects of Chinese Communist “brainwashing” on both Westerners and Chinese intellectuals).

35. *E.g.*, M. Gregg Bloche & Jonathan H. Marks, *Doing unto Others as They Did unto Us*, N.Y. TIMES (Nov. 14, 2005), <http://www.nytimes.com/2005/11/14/opinion/doing-unto-others-as-they-did-unto-us.html> [<https://perma.cc/M65B-K2T9>] (criticizing the Pentagon for signing off on “inhumane” and “ineffective” interrogation tactics that “mimic[ed] Red Army methods,” for which “truth was beside the point: their aim was to force compliance to the point of false confession”).

36. BLOCHE, *supra* note 24, at 124–25.

multiple humiliations—was meant only to create a compliant state of mind. Chinese interrogators then *shaped* compliance by encouraging and rewarding sham confessions.³⁷ Mitchell, though, contended that interrogators could sculpt compliance differently, by coaxing captives to tell the truth.³⁸

To this end, CIA interrogators put much emphasis on rapid access to intelligence from multiple sources, so as to be able to quickly spot contradictions and flag possible falsehoods.³⁹ Hubbard, moreover, reached out to psychologists who worked on the detection of deception and even co-organized a conference on this topic.⁴⁰ And Mitchell's contracts with the CIA, released last July, reveal that his approach borrowed ideas from psychologist Albert Bandura,⁴¹ whose widely recognized work on how people form moral and political beliefs has drawn interest from national security psychologists interested in changing militants' moral allegiances.⁴² How, exactly, Mitchell and his colleagues marshalled Bandura's thinking, the science of deception detection, and CIA information-sharing capabilities so as to shape compliance remains uncertain; the documents that set out this story remain mostly classified. But it is clear that the designers of Enhanced Interrogation took the danger of false leads seriously and sought to bring science to bear on the task of cajoling their despairing victims to reveal truth.

37. *Id.* at 125.

38. *Id.* at 136.

39. *See id.* (indicating that detecting falsehood in real time in order to swiftly punish dishonesty was necessary to coerce detainees to tell the truth). How well they achieved this in practice is uncertain. The Senate Select Committee on Intelligence unearthed multiple instances of what might be charitably called confirmation bias—episodes in which detainees provided inaccurate information that fit interrogators' preconceptions and that interrogators therefore believed. S. REP. NO. 113-288, at 85–96, 108–09 (2014).

40. DAVID H. HOFFMAN ET AL., SIDLEY AUSTIN LLP, REPORT TO THE SPECIAL COMMITTEE OF THE BOARD OF DIRECTORS OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION: INDEPENDENT REVIEW RELATING TO APA ETHICS GUIDELINES, NATIONAL SECURITY INTERROGATIONS, AND TORTURE 173–79 (2015) [hereinafter SIDLEY REPORT].

41. The contracts speak euphemistically. A “Statement of Work” dated April 2003 (at the height of the “Enhanced Interrogation” program, when Mitchell was personally overseeing, even conducting, Enhanced Interrogation at CIA Black Sites) includes the following language:

3.0 DELIVERABLES

3.1 Adapt and modify the Bandura social cognitive theory for application in operational settings.

3.2 Refine variables of interest to assess in order to apply the model (3.1) to specific individuals.

Exhibit 1 to Notice of Filing of Defendants' Contracts and Nondisclosure Agreements at 72–73, *Salim v. Mitchell*, No. 2:15-CV-286 (E.D. Wash. Oct. 11, 2016) [hereinafter *Mitchell Contracts*]. The ACLU obtained these contracts via discovery in the course of litigation against Mitchell (the ACLU represents several former CIA detainees in pending tort litigation against Mitchell). Notice of Filing of Defendants' Contracts and Nondisclosure Agreements at 2, *Salim v. Mitchell*, No. 2:15-CV-286 (E.D. Wash. Oct. 11, 2016). ACLU attorneys shared these contracts with the author.

42. Thomas J. Williams et al., *Operational Psychology: Foundation, Applications, and Issues*, in *THE OXFORD HANDBOOK OF MILITARY PSYCHOLOGY* 37, 40–41 (Janice H. Laurence & Michael D. Matthews eds., 2012).

Recently released language from another CIA document shows that the program's designers also fretted over the possibility that extended sleep deprivation would degrade cognition to the point that even willing prisoners wouldn't be able to recall and recount what they knew. Previously redacted paragraphs from a CIA Office of Medical Services (OMS) directive to black-site physicians note the adverse cognitive impact of sleeplessness and complain that "[t]he circumstances that medical officers will be called to advise on in the detainee programs" haven't been the subject of "reported research."⁴³ The directive instructs physicians (who, it makes plain, codesigned regimens of sleep deprivation and other abuse)⁴⁴ to use their "clinical judgment" to balance between "demonstrating helplessness in an unpleasant environment" and keeping detainees "reasonably attentive, and clear-thinking" during interrogation.⁴⁵

As O'Mara points out, a large body of published research on sleep deprivation demonstrates its devastating effects on people's ability to search through memory or otherwise process information.⁴⁶ The OMS directive gives this research short shrift—and cites none of it.⁴⁷ Moreover, as O'Mara notes, the subjects of this research have been patients with insomnia or people who have agreed to endure mild to moderate sleeplessness in laboratory settings.⁴⁸ The extreme sleep deprivation (accompanied by other intense stress) that was a hallmark of Enhanced Interrogation⁴⁹ surely did greater damage to cognitive function. But supporters of the CIA's approach could argue, as some have, that this cognitive degradation is more a plus than a minus. Sleep deprivation, O'Mara notes, quoting a review article, "impairs decision making involving the unexpected, innovation, revising plans, competing distraction, and effective communication."⁵⁰ It could thus undermine a resistant interviewee's ability to spin persuasive falsehoods, tell consistent half-truths, and otherwise detect and adapt to an interviewer's

43. CENT. INTELLIGENCE AGENCY OFFICE OF MED. SERVS., OMS GUIDELINES ON MEDICAL AND PSYCHOLOGICAL SUPPORT TO DETAINEE RENDITION, INTERROGATION, AND DETENTION 16 (2004), <https://www.cia.gov/library/readingroom/docs/0006541536.pdf> [<https://perma.cc/6WZE-SN4Z>] [hereinafter OMS GUIDELINES].

44. M. Gregg Bloche, Opinion, *When Doctors First Do Harm*, N.Y. TIMES (Nov. 22, 2016), <https://www.nytimes.com/2016/11/22/opinion/doctors-should-stand-against-trump-reviving-torture.html> [<http://perma.cc/2RCG-ZBUS>].

45. OMS GUIDELINES, *supra* note 43, at 15–16.

46. O'MARA, *supra* note 10, at 160–67.

47. See OMS GUIDELINES, *supra* note 43, at 15 (briefly mentioning that "cognitive effects . . . are [a] common" result of sleep deprivation, but citing none of the research discussed by O'Mara).

48. O'MARA, *supra* note 10, at 161–65.

49. The CIA OMS permitted sleep deprivation for up to forty-eight hours at a time; moreover, these forty-eight-hour sleep-deprivation periods could be continuously repeated, after just two hours of sleep, for up to 180 hours. OMS GUIDELINES, *supra* note 43, at 15–16.

50. O'MARA, *supra* note 10, at 158 (quoting Yvonne Harrison & James A. Horne, *The Impact of Sleep Deprivation on Decision Making: A Review*, 6 J. EXPERIMENTAL PSYCHOL.: APPLIED 236, 236 (2000)).

stratagems. Whether, from an intelligence-gathering perspective, these effects outweigh impairments of memory and recall isn't a question that the research literature answers.

To sum up, proponents of the position that the CIA's torture program didn't "work" have summoned a series of straw men. The program's design differed sharply from the pop-culture meme of torture as intimidation by brute force; indeed, the program's chief architect warned that setting up a "battle of wills" between interrogator and captive would backfire. Moreover, the program didn't simply mime Chinese methods for extracting sham confessions (which would have made it transparently unsuited for seeking *truth*); rather, the CIA sought to *shape* prisoners' "compliance" differently, drawing upon contemporary psychological thinking about persuasion and deception detection. Nor did the Agency disregard evidence of sleep deprivation's corrosive effects on cognition; rather, CIA physicians were instructed to take them into account, however unscientifically, in customizing regimens of sleep deprivation and other abuse.⁵¹

This is *not* to suggest that the CIA's actions weren't torture. Much of what the Agency did to prisoners rose to the level of torture under international law,⁵² as the Obama Administration would later acknowledge on our nation's behalf.⁵³ But it *is* to say that it's a misunderstanding to treat "torture" as an interrogation strategy, to be compared to "rapport-building" or other approaches. "Torture" is a legal and moral concept—a level of misery that law and decency say we must not inflict. It is *not* an interrogation method or model. Multiple interrogation methods can rise to the level of torture as a matter of law. They shouldn't therefore be treated as a single approach for the purpose of inquiring into whether they, or torture, "work." The question of whether torture works makes no sense without clarity about the method or model we're assessing, as well as the alternatives to which we're comparing it.

II. Putting Torture to the Test?

So does the CIA's enhanced interrogation strategy—James Mitchell's model—"work" as an intelligence-gathering tool? Critics of the CIA's interrogation program point to accounts of intelligence-gathering success through rapport-building methods⁵⁴ as proof that they are more effective.

51. OMS GUIDELINES, *supra* note 43, at 15–16.

52. *See supra* note 3.

53. Kathleen Hennessey, *Obama: 'We Tortured Some Folks,'* L.A. TIMES (Aug. 1, 2014), <http://www.latimes.com/nation/politics/politicsnow/la-pn-obama-torture-20140801-story.html> [<https://perma.cc/7LV4-PCEG>].

54. *See, e.g.,* STEVEN KLEINMAN, NATIONAL SECURITY INTERROGATIONS: MYTH V. REALITY 2 (2011), <http://s3.amazonaws.com/content.thirdway.org/publishing/documents/pdfs/000/001/297/national-security-interrogations-myth-v-reality.pdf?1462826469> [<https://perma.cc/S6D4-EDFF>].

They dispute the CIA's claims⁵⁵ to have obtained actionable intelligence through enhanced interrogation, and since 2014 they've been able to point to a detailed rebuttal of these claims by the U.S. Senate Select Committee on Intelligence (SSCI) in its study of the CIA's post-9/11 interrogation program.⁵⁶ But this rebuttal isn't proof, in a rigorous sense, that the Mitchell model doesn't work.

For one thing, many of the particulars of this rebuttal (and of the CIA's claims of efficacy) remain classified. The threads of evidence and inference that support (or counter) assertions that attacks were thwarted, terror networks disrupted, and perpetrators captured or killed as a consequence of enhanced interrogation aren't fully accessible. We're left to take the SSCI's conclusions more or less on faith.⁵⁷

A. *The Limits of Science*

More importantly, a review of cases—e.g., particular interrogations or of plots allegedly thwarted—cannot show in a scientific sense that an interrogation method does or doesn't “work.” Cases are anecdotal evidence. They permit the detection of coincidence, not causality. Suppose, for example, that several or more terror suspects interrogated in the same manner disclose facts that help to foil plots. This tells us nothing about the effectiveness of the chosen interrogation method—nothing about its superiority (or inferiority) to other methods of getting these facts. To make a meaningful comparative judgment, we'd need to contrast results obtained using *each* of the methods we wished to weigh, and we'd need to ensure that each method is employed on a similar population. For most readers of this Essay, I'm stating the obvious. Yet this has gone unrecognized in public wrangling over the CIA program's effectiveness.

(citing evidence that a rapport-based approach “has often induced detainees to volunteer important operational information that the interrogator may not have suspected they possessed”).

55. Memorandum from John O. Brennan, Dir., CIA, Comments on the Senate Select Comm. on Intelligence's Study of the Cent. Intelligence Agency's Former Det. & Interrogation Program to Senators Dianne Feinstein & Saxby Chambliss 13 (June 27, 2013), https://www.cia.gov/library/reports/CIA_June2013_Response_to_the_SSCI_Study_on_the_Former_Detention_and_Interrogation_Program.pdf [<https://perma.cc/WY66-WYVT>] [hereinafter CIA Comments].

56. Thousands of pages from this detailed study remain classified, but in December 2014 the Committee released its 525-page summary, including a “Findings and Conclusions” section and an “Executive Summary,” in largely unredacted form. This document is mostly dedicated to contesting CIA claims that the program helped to foil terror plots and kill or capture high-profile terror suspects (including Osama bin Laden). SEN. REP. NO. 113-288, Foreword, at 3 (2014).

57. My own view is that the SSCI's Executive Summary and Findings and Conclusions, *supra* note 56, set out a potent argument for the minimal value of the CIA's brutal methods in the cases the SSCI reviewed. My limited point here is that nondisclosure of the six thousand plus pages of the SSCI report, plus much of the documentary evidence (e.g., internal CIA communications, deliberations, and findings) that the report relied upon, makes full, rigorous assessment of the SSCI's judgments impossible.

Medical researchers go about such comparisons in two ways: by randomly assigning subjects from a homogenous pool to one of the two or more treatment methods being studied, or by statistically adjusting for differences between populations after the fact when these methods have already been employed on differing groups of people.⁵⁸ The former approach, the randomized, controlled clinical trial, is often said to be the “gold standard” (so long as the patient populations being studied are sufficiently large and homogeneous to generate statistically significant results);⁵⁹ the latter is a compromise that reflects the difficulty of doing randomized trials. The history of medicine is replete with deeply held beliefs, based on anecdotal impression, about the effectiveness of treatments that were later proven useless, even harmful.

Enhanced interrogation has not been put to anything resembling these tests. A randomized, prospective trial of the Mitchell model versus other approaches cannot be done. Because captives’ knowledge about terrorist plots and networks differs widely, detainee populations lack the homogeneity needed for such a trial. Large differences in what detainees know would confound efforts to compare interrogation methods’ performance, especially if the population under study numbers in the dozens rather than the hundreds or thousands. Variations in prisoners’ personalities and motives would further confound such comparisons, as would the fact that interrogators customize their approaches to prisoners in iterative fashion, based on their impressions of each prisoner’s responses.⁶⁰ “Success,” moreover, would be difficult to quantitate and compare systematically, since relationships between information from detainees and ultimate intelligence payoffs are often indirect and subjective. The same problems would confound any effort to compare alternative interrogation strategies retrospectively (and would make after-the-fact adjustment for group differences impossible).

In a recently declassified excerpt from a February 2005 paper for CIA leaders, Mitchell himself pointed to this set of problems.⁶¹ Resistance to interrogation, he wrote (with his psychologist–collaborator Bruce Jessen), “is not overcome through the use of this physical technique to obtain that

58. ALVAN R. FEINSTEIN, *CLINICAL EPIDEMIOLOGY: THE ARCHITECTURE OF CLINICAL RESEARCH* 295, 298–99 (1985).

59. Laura E. Bothwell et al., *Assessing the Gold Standard—Lessons from the History of RCTs*, 374 *NEW ENG. J. MED.* 2175, 2175 (2016).

60. The CIA alluded to such difficulties in its response to the SSCI’s criticism of the Agency’s failure to conduct a “comprehensive analysis” of the Enhanced Interrogation program’s effectiveness. See CIA Comments, *supra* note 55, at 24.

61. CENT. INTELLIGENCE AGENCY, *SUMMARY AND REFLECTIONS OF CHIEF OF MEDICAL SERVICES ON OMS PARTICIPATION IN THE RDI PROGRAM* 45 (2016) (quoting James E. Mitchell & John B. Jessen, *Interrogation and Coercive Physical Pressures: A Quick Overview* (Feb. 2005) (unpublished manuscript)), https://www.thetorturedatabase.org/files/foia_subsite/cia_prod_c065441727.pdf [<https://perma.cc/FSW2-GZLY>].

effect . . . independent of the other forces at work.”⁶² Thus, the two contended, “the relative contribution of individual interrogation techniques” cannot “be teased out and quantified.”⁶³ They added:

[T]he choice of which physical techniques, if any, to use is driven by an individually tailored interrogation plan and by a real-time assessment of the detainee’s strengths, weaknesses and reactions to what is happening. . . . [A] single physical interrogation technique is almost never employed in isolation from other . . . influence strategies. . . . Rather, multiple techniques are deliberately orchestrated and sequenced”⁶⁴

This, they argued, makes standardization for research purposes impossible.⁶⁵

B. *The Ethical Barrier*

More chillingly, torturing prisoners as part of a science experiment conjures up images of Dr. Mengele, grotesquely beyond the bounds of both international law and transnational medical ethics.⁶⁶ As the CIA’s interrogation program unfolded, agency officials recognized this prohibition—though recently released documents suggest that they didn’t fully honor it.

In a 2010 e-mail, Hubbard told me the Agency did no such study, and that he didn’t think one could be approved.⁶⁷ Regulations governing human-subjects research by multiple agencies, including the CIA, make it plain that such research is beyond the pale. The regulations, known as the federal “Common Rule,” require “voluntary,” informed consent to “research involving more than minimal risk.”⁶⁸ That clandestine imprisonment and abuse meant to induce despair don’t permit “voluntary” consent was appreciated by at least some in the CIA’s OMS, who, according to the SSCI, warned agency leaders that studying the program’s results would constitute unlawful human experimentation.⁶⁹

62. *Id.* (emphasis omitted).

63. *Id.*

64. *Id.*

65. *Id.*

66. See generally ROBERT JAY LIFTON, *THE NAZI DOCTORS: MEDICAL KILLING AND THE PSYCHOLOGY OF GENOCIDE* (1986).

67. E-mail from Kirk Hubbard, former Behavioral Scis. Chief, CIA, to author (April 21, 2010) (on file with author).

68. 45 C.F.R. § 46.116(a) (2016). The “Common Rule,” so-called because it was adopted by the Department of Health & Human Services and other federal agencies in coordinated fashion, was made binding on the CIA by President Ronald Reagan in 1981, via Executive Order. Exec. Order No. 12,333, 3 C.F.R. 200 (1982), reprinted in 50 U.S.C. § 401 (1982); Office for Human Research Prots., *Federal Policy for the Protection of Human Subjects* (“Common Rule”), HHS.GOV (Mar. 18, 2016), <https://www.hhs.gov/ohrp/regulations-and-policy/regulations/common-rule/> [<https://perma.cc/FMJ9-P8TU>].

69. S. REP. NO. 113-288, Executive Summary, at 126 (2014).

But what about efforts to assess these results comprehensively, after the fact, without comparative study of enhanced interrogation versus other methods? In a January 2005 e-mail to CIA Director Porter Goss, the Agency's Inspector General, John Helgerson, pushed back against OMS's human-subjects research objection. "I fear there was a misunderstanding[.]" Helgerson told Goss:

OIG [Office of the Inspector General] did not have in mind doing additional, guinea pig research on human beings. What we are recommending is that the Agency undertake a careful review of its experience to date in using the various techniques and that it draw conclusions about their safety, effectiveness, etc. . . .⁷⁰

Recently released documents suggest that the Agency conducted such a lookback—or at least laid the information-gathering groundwork for a retrospective study.

The CIA's contracts with Mitchell, the interrogation program's chief architect, make cryptic reference to "applying research methodology to meet mission goals."⁷¹ Contract "deliverables" include "variables of interest to assess" when applying Bandura's model and "strategies and methods for assessing [these] variables . . . in high risk operational settings."⁷² The nature of this "research methodology" and its associated "variables" and "strategies and methods" remains opaque. The CIA has so far refused to release additional documentation on these research efforts in response to Freedom of Information Act requests by myself and others.

But language (some of which was declassified and released only last summer) in the OMS's directive to black-site "medical officers"⁷³ is consistent with a classified effort to draw some evidence-based conclusions about the risks and efficacy of torture techniques. This language instructed medical officers to record information about the type and duration of the techniques employed (including shackling in stressful positions, sleep deprivation, and waterboarding), as well as clinical sequelae, including ulcerations, edema, venous thromboses (blood clots), and whether the naso- or oro-pharynx was flooded during waterboarding.⁷⁴ Twice—when

70. E-mail from John Helgerson, Inspector Gen., to Porter Goss, CIA Dir. (Jan. 28, 2005), quoted in S. REP. NO. 113-288, Executive Summary, at 126 (2014).

71. Mitchell Contracts, *supra* note 41, at 73. This language is from a contractual "Statement of Work" dated April 2003, near the height of the Enhanced Interrogation program.

72. *Id.*

73. CIA "Medical Officers" included psychologists, physicians, and physician assistants. Katherine Hawkins, *Medical Complicity in CIA Torture, Then and Now*, JUST SECURITY (July 1, 2016, 9:45 AM), <https://www.justsecurity.org/31762/medical-complicity-cia-torture/> [<https://perma.cc/M8TJ-VCLS>].

74. See generally CIA Office of Med. Servs., *Draft Office of Medical Services Guidelines on Medical and Psychological Support to Detainee Interrogations*, in CENTRAL INTELLIGENCE AGENCY INSPECTOR GENERAL SPECIAL REVIEW: [REDACTED] COUNTERTERRORISM DETENTION AND INTERROGATION ACTIVITIES (SEPTEMBER 2001–OCTOBER 2003), 153, 155–63 (May 7, 2004),

addressing shackling and waterboarding—OMS stated that officers should collect this information “[i]n order to best inform future medical judgments and recommendations.”⁷⁵ Moreover, language declassified and released last fall, from a still largely redacted statement by the CIA’s Director of Medical Services, shows ongoing commitment in early 2005 to more rigorous assessment of the Mitchell “methodology.”⁷⁶ Pushing back against Mitchell’s and Jessen’s skeptical view of such assessment, the Director argued:

The assumption was that a gifted interrogator would know best; and the implicit message was that this art form could not be objectively analyzed. Indeed, by this time their methodology was more nuanced, in stark contrast to the rapid escalation and indiscriminate repetitions of early interrogations. Still, there remained a need to look more objectively for the least intrusive way to gain cooperation.⁷⁷

Forty-one pages of entirely redacted text follow these words tantalizingly, inviting the question of what more the CIA did, on a still-classified basis, to “look more objectively.”⁷⁸

The OMS directive did venture some conclusions, albeit without explaining their basis beyond an occasional reference to “experience.” For example, it judged sleep deprivation to be “among the most effective adjuncts to interrogation” and “the only technique with a demonstrably cumulative effect—the longer the deprivation (to a point), the more effective the impact.”⁷⁹ “Cramped confinement” in “awkward boxes,” by contrast, “ha[s] not proved particularly effective,” OMS said, “as they may become a safehaven offering a respite from interrogation.”⁸⁰ And waterboarding’s effectiveness was “not yet known.”⁸¹ “Subjects unquestionably can

<https://www.cia.gov/library/readingroom/docs/0005856717.pdf> [http://perma.cc/MH9U-CARW] [hereinafter *Draft OMS Guidelines*]. This iteration of the guidelines was the version most likely distributed to black-site medical officers at the height of the Enhanced Interrogation program. For a later draft of the guidelines, see OMS GUIDELINES, *supra* note 43, at 6–20.

75. OMS GUIDELINES, *supra* note 43, at 15, 20.

76. See CENT. INTELLIGENCE AGENCY, *supra* note 61, at 45–46 (discussing Mitchell and Jessen’s work and noting the importance of finding less intrusive interrogation methods). This document is undated, but the previous paragraph cites an unpublished, apparently classified paper by Mitchell and Jessen dated February 2005, indicating that this document was written then or after.

77. *Id.* at 45–46.

78. *Id.* at 47–88.

79. *Draft OMS Guidelines*, *supra* note 74, at 159; see also OMS GUIDELINES, *supra* note 43, at 15.

80. *Draft OMS Guidelines*, *supra* note 74, at 159; see also OMS GUIDELINES, *supra* note 43, at 16.

81. *Draft OMS Guidelines*, *supra* note 74, at 160; see also OMS GUIDELINES, *supra* note 43, at 17.

withstand a large number of applications,” OMS reported, “with no seeming cumulative impact beyond their strong aversion to the experience.”⁸²

All of this raises the explosive possibility that the CIA conducted a clandestine program of human-subjects research on the risks and efficacy of torture, in violation of the Common Rule. What the CIA’s Inspector General called “guinea pig research” (presumably meaning prospective trial of alternative methods) constitutes only part of the realm that the Common Rule governs. The Rule defines “research” as “systematic investigation, including research development, testing and evaluation, designed to develop or contribute to generalizable knowledge.”⁸³ This encompasses systematic, *retrospective*, and observational studies, not only prospective trials. And the Rule covers human subjects of such studies if information gathered from them is “individually identifiable” to the researchers and of a sort “which the individual can reasonably expect will not be made public.”⁸⁴

OMS instructed its black-site medical officers to collect and record information *systematically*, “to best inform future medical judgments and recommendations”—language strongly suggestive of “investigation . . . designed to develop or contribute to generalizable knowledge.” OMS, moreover, evaluated the effectiveness and safety of abusive methods, at times altering these methods’ design based on its assessments.⁸⁵ And surely, information about terror plots and networks (the main measure of an interrogation’s success) is “individually identifiable”—its intelligence value can’t be assessed without a rich sense of the perspective and motives of its source. Surely, moreover, information a detainee refuses to reveal until his interrogator outwits or coerces him is information he should “reasonably expect” not to become widely known.⁸⁶ Mitchell’s contracts with the CIA,

82. *Draft OMS Guidelines*, *supra* note 74, at 160. “Whether the waterboard offers a more effective alternative to sleep deprivation and/or stress positions, or is an effective supplement to these techniques is not yet known.” *Id.* That OMS’s skepticism about waterboarding’s effectiveness at eliciting information was based at least in part on anecdotal experience, not systematic study, is suggested by an isolated text fragment (nine lines), surrounded by several pages of redacted text, in the undated “Summary and Reflections of Chief of Medical Services,” *supra* note 61, at 41. This document’s unidentified author concludes that the “cooperation” of CIA detainee Abu Zubaydah “did not correlate well with his waterboard sessions” and that “there was no evidence that the waterboard produced time-perishable information which otherwise would have been unobtainable.” *Id.* From this isolated, nine-line fragment, it’s impossible to know for certain whether the author is concluding that there is no evidence that waterboarding yielded “time-perishable,” otherwise-unobtainable information from Zubaydah or from CIA detainees more generally.

83. 45 C.F.R. § 46.102(d) (2016).

84. *Id.* § 46.102(f).

85. Bloche, *supra* note 44.

86. One might argue that intelligence useful for the disruption of terror plots or networks—or for national security purposes more generally—isn’t information a detainee should *reasonably* expect not to become known. The decisive answer to this is that torture or other abuse that breaches human rights or the laws of war is *not* something a detainee should *reasonably* expect and that intelligence extracted through these means is, therefore, information the detainee should reasonably

for a time when his sole known responsibility was to run the Enhanced Interrogation program, call explicitly for “research methodology,” “variables of interest,” and “strategies and methods for assessing [these] variables.”⁸⁷ How all of this (and possibly more) fit together as a torture-research program remains a mystery—one that calls out for a vigorous, independent inquiry to ensure that a potential human-subjects-research scandal of historic proportions isn’t covered up.

Less mysterious is whether the research hinted at in recently released CIA documents can answer the question of whether torture “works.” A research program along these lines, involving neither a randomized trial nor some other outcome-assessment strategy that compares enhanced interrogation with other methods (and adjusts for differences between the groups subjected to each),⁸⁸ can’t resolve the question of whether enhanced interrogation does better. More generally, for the reasons I’ve reviewed, a scientific answer to the question of whether torture of any sort is more effective than lawful interrogation methods is unachievable.

III. Can We Conclude Anything?

There are, nonetheless, science-based conclusions we can draw. First, the Mitchell model of interrogation is useless as an answer to the “ticking-bomb” scenario that has become the main popular and scholarly justification for torture.⁸⁹ This scenario is both mythic and manipulative. It postulates a crisis that has never occurred: a single bad actor (whom the authorities hold) knows the whereabouts of a bomb that is about to explode and kill hundreds, thousands, or more. The point of the myth is to provoke the response that we can never say never—that torture can be permissible, even necessary.⁹⁰ But this camel’s-nose gambit presumes torture’s rapid effectiveness, something even the Mitchell model’s most enthusiastic backers don’t claim. The model’s crucial first step—“inducing” compliance by reducing a prisoner to the state of helplessness Biderman described—can take weeks or months, not minutes or hours.⁹¹ “Shaping” compliance along the lines Mitchell envisioned could take weeks more, were it possible.

expect to be able to keep to himself. It should, moreover, go without saying that individuals held captive and tortured or otherwise abused are in no position to give voluntary consent.

87. See *supra* note 41.

88. The recently released documents contain no suggestion that the CIA pursued any kind of *comparative* outcomes assessment.

89. See generally FRITZ ALLHOFF, *TERRORISM, TICKING TIME-BOMBS, AND TORTURE: A PHILOSOPHICAL ANALYSIS* (2012).

90. LUBAN, *supra* note 5, at 56–60.

91. As O’Mara notes, *supra* note 10, at 251, internal estimates of the time needed for waterboarding and other abusive techniques to achieve their desired effect rose to two months. Biderman’s report on his findings from the Korean War-era Chinese interrogation program describes courses of abuse lasting weeks to months. BLOCHE, *supra* note 24, at 124–25. And former CIA Director Michael Hayden, still a staunch defender of the Mitchell model, said in his 2016 book,

That the architects of Enhanced Interrogation understood this—and thus grasped the dishonesty of the “ticking-bomb” argument—is underscored by Hubbard’s response when I queried him about President Trump’s claim that torture of an ISIS operative detained in Brussels last March could have stopped the terror attacks that traumatized that city four days later.⁹² “Why are you interested in anything that idiot Trump has to say,” Hubbard wrote back.⁹³ The “ticking-bomb” hypothetical deserves no place in debates about torture. It rests on a false premise about how torture *might* work—if indeed it *does* work—a premise at odds with the empirical basis Mitchell and Hubbard claimed for the CIA’s program.

Second, there is indirect empirical support, albeit well short of scientific proof, for the effectiveness of lawful interrogation stratagems that build on concepts from cognitive psychology. As O’Mara acknowledges, there have not been any “properly statistically powered, substantial randomized-controlled trials on the differing [interrogation] methodologies.”⁹⁴ But techniques of interpersonal influence that borrow from psychology research⁹⁵ and empirically tested psychotherapeutic methods are attracting interest from police and national security interrogators. This field is too large to review here, but an overarching theme is recasting interrogation as “interviewing,” with an eye toward exploring interview subjects’ systems of belief, social affiliations and identities, and other sources of resistance.⁹⁶ Rather than

Playing to the Edge, that it took a week, on average, “to move a detainee from defiance to cooperation by imposing on him a state of helplessness.” MICHAEL V. HAYDEN, *PLAYING TO THE EDGE: AMERICAN INTELLIGENCE IN THE AGE OF TERROR* 223 (2016).

92. Told by CNN anchor Wolf Blitzer on the air that Belgian police said the operative was cooperating, Trump replied: “Well, he may be talking but he’ll talk a lot faster with the torture. If he would have—if he would have talked, you might not have had the blow up, all these people dead and all these people horribly wounded because he probably knew about it.” *Transcript: The Situation Room*, CNN: TRANSCRIPTS (Mar. 22, 2016), <http://transcripts.cnn.com/TRANSCRIPTS/1603/22/sitroom.01.html> [https://perma.cc/8DST-W9NQ].

93. E-mail from Kirk Hubbard, former Behavioral Scis. Chief, CIA, to author (Mar. 30, 2016) (on file with author).

94. O’MARA, *supra* note 10, at 270.

95. Cognitive psychology and neuroimaging research has spotlighted the roles of social influence, empathy, pride, shame, and other emotional responses in shaping and changing people’s political and moral commitments. Indeed, much evidence supports the conclusion that these factors play a larger belief-shaping role than does reason alone. See, e.g., Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCHOL. REV. 814, 814 (2001) (arguing that people reach moral judgments intuitively, then later try to justify these judgments with post hoc reasoning).

96. A special issue of a journal maintained by interrogation researchers and practitioners, some of whom rose to prominence as critics of the CIA’s Enhanced Interrogation program, contains several articles that review this research base and set out current thinking about its implications for national security interrogation. INT’L INVESTIGATIVE INTERVIEWING RESEARCH GRP., SPECIAL ISSUE: INVESTIGATIVE INTERVIEWING FOR THE PURPOSES OF GATHERING INTELLIGENCE (2015). An earlier comprehensive review, covering similar ground in greater detail and accompanied by case studies, was prepared in 2009 by the U.S. Intelligence Science Board, an advisory body within the Office of the Director of National Intelligence. INTELLIGENCE SCI. BD., INTELLIGENCE

trying to shatter these commitments, the interviewer searches for those he or she shares—indeed interviewers are sometimes assigned to interview subjects based on the potential for such matching.⁹⁷ Interviewers prompt subjects' memories by asking them to recall feelings, weather, and even meals.⁹⁸ And they try to maneuver around interviewees' resistances by encouraging feelings of shared identity⁹⁹ and asking interviewees to reflect on contradictions between their core beliefs and continuing resistance.¹⁰⁰

In so doing, interviewers rely on research into how negotiators, politicians, and others persuade—research that has spotlighted the various roles of interpersonal reciprocity, social affiliation, personality style, pride, and shame.¹⁰¹ Interviewers also probe for falsehoods by increasing “cognitive load”—the mental demands a subject must manage as he spins out his story. For example, they ask subjects to recount events in reverse-chronological order or to draw sketches while telling their stories. Such methods build on cognitive psychology studies that suggest invention of internally consistent falsehoods is more intellectually demanding than honest recall.¹⁰²

Some of these studies have focused directly on interrogation,¹⁰³ pushing the boundaries of what human-subjects research regulation permits. For example, researchers have obtained transcripts of actual police interrogations, categorized and coded suspects' and interrogators' verbal maneuvers, and then performed large-scale content analyses with an eye

INTERVIEWING: TEACHING PAPERS AND CASE STUDIES (2009), <https://fas.org/irp/dni/isb/interview.pdf> [<https://perma.cc/AMD2-RN2N>]. O'Mara also briefly discusses this body of work. O'MARA, *supra* note 10, at 261–65.

97. Examples include matching a devout Christian interrogator with a deeply religious Muslim subject (in the hope that the shared importance of faith in their lives will become a basis for connection) and assigning an interviewer with Arab family origins to an Arab detainee. *See* INTELLIGENCE SCI. BD., *supra* note 96, at 56 (discussing “cross-cutting identities” and their value in decreasing resistance from interviewees).

98. *See id.* at 85–89 (discussing interview tactics to enhance interviewees' accurate recall).

99. *Id.* at 55–57.

100. *See id.* at 73–80 (discussing multiple dimensions of resistance and strategies to deal with them).

101. *See id.* at 9–28 (describing research about successful persuasion).

102. *See* R. Edward Geiselman, *The Cognitive Interview for Suspects (CIS)*, AM. J. FORENSIC PSYCHOL., Issue 3, 2012, at 1, 1 (describing a study about “the potential of CIS for assessing the likelihood of deception during investigative interviews”).

103. In 2010, President Obama announced a new interagency initiative, the “High-Value Detainee Interrogation Group” (HIG), an FBI–CIA–Pentagon collaboration meant to supplant CIA and Pentagon reliance on enhanced interrogation. Robert Kolker, *A Severed Head, Two Cops, and the Radical Future of Interrogation*, WIRED (May 24, 2016), <https://www.wired.com/2016/05/how-to-interrogate-suspects/> [<https://perma.cc/G9QU-LCA9>]. In addition to interrogating high-profile terror suspects (including the convicted Boston Marathon bomber and suspected members of ISIS), the HIG had, by mid-2015, funded several dozen research studies applying cognitive and social psychology models to interrogation. Interviews with three senior HIG officials (Summer 2015) (on condition of anonymity); *see also id.* (describing the origins of the HIG and reporting that it has funded 60 university-based behavioral science studies of interrogation).

toward learning which interrogators' moves are most effective at surmounting resistance (these researchers have generally found that relationship-building fares better than confrontation).¹⁰⁴ Unless researchers can persuade their institutional review board that suspects' words are not "individually identifiable," they must obtain "voluntary" consent,¹⁰⁵ a stretch when criminal charges and loss of liberty loom. Other researchers have created sham tasks for experimental subjects, wrongly accused the subjects (psychology undergraduates) of cheating, then extracted false confessions by intimating disciplinary consequences for failure to fess up.¹⁰⁶ This work suggests both the information-yielding benefits of building on relationships and the potential of confrontation to produce falsehoods. It also spotlights the ethical challenges that confront experimental study of even lawful interrogation methods.

Some dismiss these obstacles as unimportant. O'Mara, for example, urges "recruitment" and "training" of both suspects and interrogators for studies of interrogation methods' comparative effectiveness. "There are," he insists, "vast institutional memories available for the ethical conduct of these kinds of investigations."¹⁰⁷ But neither he nor others have offered a way around the obstacles I've referenced—because there isn't one. Absent a sharp break with ethical and legal principles that have governed human-subjects research for generations, comparative-effectiveness studies using suspects for whom harsh, real-world consequences loom are not possible.¹⁰⁸

104. See, e.g., Christopher E. Kelly et al., *The Dynamic Nature of Interrogation*, 40 LAW & HUM. BEHAV. 295, 306 (2016) (finding that suspect cooperation was positively influenced by relationship-building domain, but was negatively impacted by confrontation).

105. See *supra* text accompanying note 72.

106. One research team recruited undergraduate psychology students to solve a set of "logic problems" for academic credit, then falsely accused some of the students of collaborating improperly (these students had been instructed to work independently, and they had done so). Melissa B. Russano et al., *Investigating True and False Confessions Within a Novel Experimental Paradigm*, 16 PSYCHOL. SCI. 481, 483–84 (2005). These students were told that the professor in charge was unhappy about the cheating. *Id.* at 483. Adverse academic consequences were intimated, and the students were told that the irate professor wanted a signed confession. *Id.* A subset of these students was offered reassuring excuses (e.g., "I'm sure you didn't realize what a big deal it was") and told it was in their interest to confess; another subset was offered no such reassurance and told that if they didn't sign the confession, the angry professor would "handle the situation as he saw fit." *Id.* These and related procedures (including a proffered "deal") yielded double-digit percentages of false confessions. *Id.* at 484. As Russano and her colleagues point out, these and similar confrontational methods are commonly used by police interrogators—indeed they are cornerstones of the widely taught "Reid Technique" for extracting confessions from criminal suspects. *Id.* at 481–82. See generally FRED E. INBAU ET AL., CRIMINAL INTERROGATION AND CONFESSIONS (3d ed. 1986) (addressing issues regarding specific interrogation techniques and the underlying principles surrounding the Reid Technique).

107. O'MARA, *supra* note 10, at 269 (offering no explanation of what he means by "institutional memories").

108. Recruitment of subjects (e.g., undergraduate students) to participate in sham interrogation scenarios without significant real-world consequences offers a way around this problem, but the very artificiality that could make such studies ethical also gives them dubious real-world value.

We're thus unable to conclude decisively that emerging cognitive psychology-based techniques are more effective than either the CIA's post-9/11 torture strategy or the confrontational methods traditionally taught to police interrogators.¹⁰⁹ But neither does the available evidence favor what the CIA did. To the contrary, the research findings on memory, persuasion, and resistance that undergird the cognitive psychology-based approach merit the tentative belief that it gets better results.

Comparative assessment of medical treatments offers a useful model for making this judgment. A global public-private alliance, including the World Health Organization and leading professional societies, has come together behind a grading scheme for evidence of clinical efficacy.¹¹⁰ The scheme confers quality ratings—"High," "Moderate," "Low," or "Very Low"—upon bodies of published evidence (ranging from randomized trials to case reports) relied upon by authors of medical practice protocols. The absence of randomized-trial data—along with heavy reliance on observational studies, case reports, and indirect inference from behavioral science research—render the evidence supporting the cognitive psychology approach "Low" or "Very Low" quality within this scheme.¹¹¹ That's insufficient for issuers of medical-practice protocols, who typically require a grade of "High" or "Moderate" to go forward, and it isn't enough to conclude that *science* compels the cognitive psychology approach. But neither is it equipoise, so it lends support to preference for this approach over the Mitchell model or other abusive methods.¹¹²

IV. Torture and Powerlessness

Given this evidence and torture's *jus cogens* unlawfulness, what explains its ongoing appeal to most Americans and to some national security policy makers? In times past, rulers and their subjects openly embraced torture's ferocity—indeed, high-profile brutality was the point. Unbridled cruelty toward captives, Luban notes, celebrated military victors' total

109. For an authoritative presentation of the most widely used confrontational approach, the so-called "Reid Technique," see INBAU ET AL., *supra* note 106, at 78–81.

110. See generally THE COCHRANE COLLABORATION, COCHRANE HANDBOOK FOR SYSTEMATIC REVIEWS OF INTERVENTIONS § 12.2.1, http://handbook.cochrane.org/index.htm#chapter_12/12_2_1_the_grade_approach.htm [<http://perma.cc/DN9Y-UZ6B>] (describing the GRADE approach).

111. See *id.* §§ 12.2.2–12.2.3 (grading evidence from observational studies and case reports, absent randomized trials, as "Low" or "Very Low"; grading indirect inference from controlled studies similarly).

112. Pursuant to the National Defense Authorization Act for Fiscal Year 2016, 42 U.S.C. § 2000dd-2(a)(6)(B) (2015), an interagency body created by former President Obama to formulate national security interrogation policy, *supra* note 103, formally adopted the cognitive psychology-based approach as "best practice" in August 2016. See generally HIGH-VALUE DETAINEE INTERROGATION GRP., INTERROGATION BEST PRACTICES (2016), <https://www.fbi.gov/file-repository/hig-report-august-2016.pdf/view> [<http://perma.cc/QLC4-YA92>].

triumph.¹¹³ Terrorism of whole populations through vicious example squelched challenges to tyrannical rule,¹¹⁴ and gruesome punishments expressed the sovereign's wrath toward perpetrators of crime, real and imagined.¹¹⁵ But today's torturers try to hide and temper the ferocity. The story of enhanced interrogation has only partially emerged, thanks to the persistence of journalists, academics, and congressional investigators. It is well established, though, that its designers eschewed brute force in favor of more subtle ways to reduce subjects to despair.¹¹⁶ And the professed goals of those who urge a return to torture are informational—intelligence to protect the nation—not triumphalist, terroristic, or punitive. One might expect people who fear for the nation's safety (and their own) to follow the evidence, imperfect as it is, and to resolve empirical uncertainty in favor of compliance with the law of nations.

That some in the national security policy elite refuse to do so, insisting that enhanced interrogation works best, is said by some progressives to reflect a quest for vengeance. O'Mara warns that "the desire to punish the detainee" conflicts with pursuit of information from him.¹¹⁷ The authors of the SSCI study go further, characterizing the CIA's claims of success as dishonest cover for lawless reprisal.¹¹⁸ But a more variegated explanation seems to me more powerful—more helpful as a starting point for pushing back against torture's appeal.

I grant that outrage at terrorists and fierce desire to punish them play a role, conscious or subliminal, in distorting perceptions of evidence and thus tilting policy. Consider, though, the vision that animated the CIA. In its directive to black-site physicians, OMS began by noting that the Agency's interrogation methods "are designed to psychologically 'dislocate' the detainee," to "maximize his feeling of vulnerability and helplessness."¹¹⁹

113. See LUBAN, *supra* note 5, at 50 & n.25 (citing Nietzsche's chilling reference to "the enjoyment of violation").

114. *Id.* at 51; see also HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 288 (2d enlarged ed. 1951) (observing that absolutist regimes needn't link brutal treatment to individuals' offenses to prevent uprisings through mass terror).

115. See LUBAN, *supra* note 5, at 51–52 (drawing on Michel Foucault's argument to this effect in *DISCIPLINE AND PUNISH*).

116. See *supra* text accompanying notes 20–22.

117. O'MARA, *supra* note 10, at 242.

118. S. REP. NO. 113-288, Findings and Conclusions, at 2–3 (2014).

119. *Draft OMS Guidelines*, *supra* note 74, at 153. Similar language can be found in the so-called Torture Memos, the August 2002 and May 2005 opinions from the Department of Justice Office of Legal Counsel, that permitted the Enhanced Interrogation program to proceed. *E.g.*, Memorandum from Jay S. Bybee, Assistant Attorney Gen., U.S. Dep't of Justice Office of Legal Counsel, on Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A to Alberto R. Gonzales, Counsel to the President 29 (Aug. 1, 2002); Memorandum from Steven G. Bradbury, Principal Deputy Assistant Attorney Gen., U.S. Dep't of Justice Office of Legal Counsel, on Application of United States Obligations Under Article 16 of the Convention Against Torture to

Dislocation and vulnerability are what vast numbers of Americans felt in 9/11's wake. Enhanced interrogation turned this feeling back onto those who attacked us—or, at least, onto a small number whom we'd managed to take alive.¹²⁰ It brought some of us, therefore, security of a symbolic sort—the sense “that we could assert control in the face of sudden, dislocating helplessness.”¹²¹ The large roles of medicine and the behavioral sciences in the design of the CIA's program reinforced this feeling of control with the promise of clinical precision. And in the years since, as many Americans experienced profound economic dislocation, fear of terrorism became a meme for a more general sense of powerlessness, sustaining torture's symbolic appeal as an antidote.

Seen through this lens, abusive methods can appear to work. Confirmation bias can set in. Intelligence extracted from torture victims can be ascribed to torture methods, whether or not it might have been acquired by other means. Facts obviously obtained by other methods (say, phone monitoring) can seem less important; meanwhile, information extracted from prisoners subjected to torture can loom large. Such cognitive distortion, not rank dishonesty, likely explains support for torture among intelligence professionals whom one might expect to be more attuned to empirical uncertainty.

V. Backlash: Science, Ethics, and Optics

Torture is back on our national agenda, openly embraced by an American president for the first time in history. Torture opponents' claims to have shown that it doesn't “work” don't hold up to close scrutiny. There isn't scientific proof that techniques rising to the level of torture don't fare better than other approaches to extracting intelligence from terror suspects. For both practical and ethical reasons, such proof is unobtainable. But the balance of probabilities, based on indirect inference from available science, supports the judgment that methods grounded in what we know about cognition and persuasion perform better than the Enhanced Interrogation approach employed with devastating effect in 9/11's immediate wake.

That the effect was strategically devastating is underscored by studies showing the torture program's corrosive effect on U.S. allies' willingness to cooperate militarily, its power as a terrorist recruiting tool, and the propaganda benefits it bestowed upon nations like Russia, Iran, and North

Certain Techniques that May Be Used in the Interrogation of High Value al Qaeda Detainees to John A. Rizzo, Senior Deputy Gen. Counsel, Cent. Intelligence Agency 30 (May 30, 2005).

120. That some of those interned and abused at black sites, Guantanamo, and elsewhere turned out not to have been involved in planning attacks against the United States (or otherwise part of terror groups targeting us) went lost on some enhanced interrogation supporters, who seemed to treat these people as collateral damage.

121. BLOCHE, *supra* note 24, at 150–51.

Korea.¹²² It sapped our “soft power” and bolstered our foes’ hard power. Its lawlessness, moreover, has hindered prosecution of terrorists and led to litigation against European governments complicit in the operation of black sites.¹²³ Those who embraced torture as national policy bet on being able to keep it to the “dark side.” But cover-up of such a vast enterprise, so sharply at odds with transnational norms of decency, proved unsustainable.

Backlash against the post-9/11 torture program is, moreover, undermining efforts to base national security interrogation on state-of-the-art behavioral science thinking. In an astonishing breakdown of professional self-governance, the organization that issues ethics rules for America’s more than 100,000 psychologists allowed a small cadre of members with ties to the Enhanced Interrogation program to secure a 2005 position statement immunizing participating psychologists against ethical and legal accountability.¹²⁴ As evidence of psychologists’ role in the torture program emerged, leaders of the organization, the American Psychological Association (APA), refused to revisit this statement or act against the psychologists involved.¹²⁵ Dissenting members became furious, activists revealed internal communications expressing contempt for international human rights law’s restraints, and demands grew for an independent inquiry into how the APA’s free pass for complicity in torture came about.¹²⁶

The findings of the eventual inquest, conducted by Sidley Austin LLP, were scathing. Based on scores of interviews and review of thousands of previously confidential documents, Sidley’s investigative team found in 2015 that the APA’s ethics director colluded with military psychologists (including some who oversaw enhanced interrogation at Guantanamo and Abu Ghraib)

122. Douglas A. Johnson et al., *The Strategic Costs of Torture: How “Enhanced Interrogation” Hurt America*, FOREIGN AFFAIRS, Sept./Oct. 2016, at 121, 129–30.

123. *Id.* at 127.

124. BLOCHE, *supra* note 24, at 162–66. The statement conferred this immunity tacitly, by decreeing that “[p]sychologists involved in national security-related activities . . . follow all applicable rules and regulations that govern their roles,” but then adding that “[o]ver the course of the recent United States military presence in locations such as Afghanistan, Iraq, and Cuba [Guantanamo], such rules and regulations have been significantly developed and refined.” *Id.* at 163. This was, of course, an allusion to the Bush Administration’s contortionist redefinition of torture, the Administration’s basis for claiming enhanced interrogation was lawful—and thus the APA’s basis for treating psychologists’ participation as ethical.

125. *See id.* at 164–65 (describing the APA’s task force and the military psychologists’ reaction to the *New York Times* article on the psychologists’ role at Guantanamo).

126. *See, e.g.*, Spencer Ackerman, *US Torture Doctors Could Face Charges After Report Alleges Post-9/11 “Collusion,”* GUARDIAN (July 11, 2015), <https://www.theguardian.com/law/2015/jul/10/us-torture-doctors-psychologists-apa-prosecution> [<https://perma.cc/XMQ9-BHZU>] (detailing the criticism and complaints leveled against the APA by its critics prior to the inquest); James Risen, *American Psychological Association Bolstered C.I.A. Torture Program, Report Says*, N.Y. TIMES (Apr. 30, 2015), <https://www.nytimes.com/2015/05/01/us/report-says-american-psychological-association-collaborated-on-torture-justification.html> [<http://perma.cc/45BM-FZC5>] (describing the APA board’s ordering of an independent review of the Association’s role in interrogation).

to protect psychologists from punitive consequences for participation in torture, first via the 2005 position statement and then through a campaign to disparage critics of the 2005 statement.¹²⁷ The association sacked its ethics director,¹²⁸ rescinded the 2005 statement, and banned its members from participating in national security interrogation.¹²⁹

The ban was an understandable response to outrage over the profession's lead role in post-9/11 torture, but it paralyzed national security policy makers' efforts to enlist behavioral science expertise in support of lawful interrogation.¹³⁰ Its proponents conflated lawful interrogation with torture, then made the category mistake of applying therapeutic ethics to a nontherapeutic endeavor—intelligence gathering for national security purposes. The APA resolution containing the ban tacitly *acknowledges* this mistake by conceding that psychologists perform an array of nontherapeutic services, including forensic assessment and consultation to interrogators, in the criminal justice setting.¹³¹ The resolution *permits* these—without explaining why—without even trying to distinguish between lawful national security and criminal justice interrogation.

127. SIDLEY REPORT, *supra* note 40, at 9, 18–20, 260–61, 388–91.

128. Spencer Ackerman, *Psychologist Accused of Enabling US Torture Backed by Former FBI Chief*, GUARDIAN (July 12, 2015), <https://www.theguardian.com/law/2015/jul/12/apa-torture-report-louis-freih-stephen-behnke> [<http://perma.cc/DJP5-JVVC>].

129. The APA decreed that “psychologists shall not conduct, supervise, be in the presence of, or otherwise assist any national security interrogations for any military or intelligence entities, including private contractors working on their behalf, nor advise on conditions of confinement insofar as these might facilitate such an interrogation.” AM. PSYCHOLOGICAL ASS’N, RESOLUTION TO AMEND THE 2006 AND 2013 COUNCIL RESOLUTIONS TO CLARIFY THE ROLES OF PSYCHOLOGISTS RELATED TO INTERROGATION AND DETAINEE WELFARE IN NATIONAL SECURITY SETTINGS, TO FURTHER IMPLEMENT THE 2008 PETITION RESOLUTION, AND TO SAFEGUARD AGAINST ACTS OF TORTURE AND CRUEL, INHUMAN, OR DEGRADING TREATMENT OR PUNISHMENT IN ALL SETTINGS 5 (2015), <http://www.apa.org/independent-review/psychologists-interrogation.pdf> [<http://perma.cc/9R6T-222C>] [hereinafter APA, RESOLUTION TO AMEND]. A footnote to this resolution hints at a loophole: “Psychologists may provide consultation with regard to policy pertaining to information gathering methods which are humane so long as they do not violate the prohibitions of this Resolution and are not related to any specific national security interrogation or detention conditions.” *Id.* at 5 n.6. This awkward phrasing suggests that advising about interrogation in general might be acceptable, so long as advice doesn’t bear on particular interrogations with particular detainees. But this footnote’s grammatical messiness (e.g., its incoherent reference to “information gathering methods” that “are not related to any specific national security interrogation”) and indeterminate recursive logic (its prerequisite that “information gathering methods . . . not violate the prohibitions of this Resolution”—which, of course, include prohibition of advice on national security interrogation!) casts this loophole into doubt, creating career-threatening ethical and legal risk for any psychologist who contemplates giving advice on interrogation in general.

130. Psychologists could quit the APA and defy the ban, as some who work in national security have said they might do. Interviews with former CIA & military psychologists (on condition of anonymity). But doing so puts them at risk of becoming professional pariahs—and at risk for disciplinary action by state licensing boards that take their ethical guidance from the APA.

131. APA, RESOLUTION TO AMEND, *supra* note 129, at 5 n.6.

There isn't a reasoned distinction. It may make sense as a matter of ethical optics to bar psychologists from serving as interrogators;¹³² their social role as healers, committed to the well-being of patients, fits uncomfortably with their use of empathy and interviewing savvy to extract intelligence from people held captive. But psychologists serve in myriad *nontherapeutic* roles, as consultants to businesses and governments, in pursuit of marketing, management, and other goals at odds with individuals' welfare. To permit psychologists to, say, opine on criminal responsibility or competency to stand trial in capital cases—or even to help corporations pitch products to people who can ill afford them—isn't logically compatible with barring their involvement in lawful interrogation.

Yet in professional ethics, optics matter: high-visibility ethical commitments can both inspire clients' trust¹³³ and affirm professional identity.¹³⁴ Those who put the behavioral sciences into the business of torture, then tried to keep this business secret, set the stage for fierce backlash when the facts of their frisson with torture emerged. That this outrage darkened the optics, putting all behavioral science contributions to national security under a cloud, should surprise no one. As a matter of crystalline logic, the APA's 2015 ban reaches too far. But it is defensible as an assertion of professional trustworthiness and identity in response to suspicions inflamed by the behavioral sciences' lead role in an antiterror program run amok. Our nation's resulting reduced ability to tap behavioral science expertise to protect us from foes is yet another cost of our having succumbed to torture's lawless appeal.

VI. Conclusion: Is Torture “Who We Are?”

The claim that torture doesn't “work” has not and cannot be scientifically proven. But neither has the pro-torture camp established that torturers extract information others cannot. What the available science *does*

132. O'Mara urges that both national security and criminal justice interrogation be conducted *only* by “forensic psychologists” with “training in clinical, forensic, and interviewing techniques for normal, neuropsychological, and neuropsychiatric populations as well as criminal or terrorist populations.” O'MARA, *supra* note 10, at 270–71. The APA's current ethics policy prohibits this in national security-related settings where American criminal procedure's constitutional protections are not afforded. See APA, RESOLUTION TO AMEND, *supra* note 129, at 5–6.

133. Nobel Prize-winning economist Kenneth Arrow gives the example of physicians' ethical commitment to prioritize patient well-being over their own financial advantage (a commitment that is, perhaps, often honored in the breach, but that has long been a professional lodestar). This commitment, he argues, is “part of the commodity the physician sells”: it signals trustworthiness, making medical care more valuable in patients' eyes, compensating for the reduction in perceived worth that can arise from patient uncertainty about the efficacy of doctors' recommendations. Kenneth J. Arrow, *Uncertainty and the Welfare Economics of Medical Care*, 53 AM. ECON. REV. 941, 965–66 (1963).

134. See generally ELIOT FRIEDSON, *PROFESSION OF MEDICINE: A STUDY OF THE SOCIOLOGY OF APPLIED KNOWLEDGE* (1970).

suggest is that interviewing strategies grounded in state-of-the-art psychological understandings of memory and persuasion offer interrogators their best chance to obtain accurate information, even when interviewees resist.

What stronger evidence shows, beyond torture's grave damage to our global standing,¹³⁵ is its devastating effect on the minds of those whom it breaks. The behavioral science professionals who assured the Bush Administration Office of Legal Counsel that enhanced interrogation would do no lasting mental harm, clearing the way for OLC's approval, proved to be terribly wrong. At least half of the thirty-nine black-site detainees known to have endured enhanced interrogation (the actual number may have been more than 100) suffered long-term psychiatric symptoms, according to a review of clinical and court records conducted by the *New York Times*.¹³⁶ For some, these symptoms were ruinous: psychosis, sudden rage, depression, and extreme anxiety disabled them and wrecked their personal lives.¹³⁷ Had the CIA's psychologists and physicians taken account of the considerable pre-9/11 research literature on torture's psychiatric sequelae,¹³⁸ they could have readily predicted this.

As our nation contemplates a return to torture, those who oppose it are doing their utmost to focus Americans' attention on its transnational lawlessness, repugnance, and strategic costs. Torture, former President Obama has said repeatedly, is "not who we are."¹³⁹ Yet polls and election results¹⁴⁰ suggest that sometimes, it is who we want to be. Here, President Trump may be the ultimate psychologist of torture. His successful 2016 campaign was an answer to the powerlessness many feel in the face of vertiginous economic and cultural change. Trump's insight was to link this personal sense of powerlessness to his larger narrative of national weakness. Torture, like tough trade deals and the wall Mexico will pay for, became part of his muscular riposte. In the dark basements of black sites, the torturer

135. E.g., Johnson et al., *supra* note 122, at 127–28.

136. Matt Apuzzo et al., *How U.S. Torture Left a Legacy of Damaged Minds*, N.Y. TIMES (Oct. 9, 2016), <https://www.nytimes.com/2016/10/09/world/cia-torture-guantanamo-bay.html> [http://perma.cc/LU84-J37R].

137. *Id.*

138. See generally, e.g., Metin Başoğlu et al., *Psychological Effects of Torture: A Comparison of Tortured with Nontortured Political Activists in Turkey*, 151 AM. J. PSYCHIATRY 76 (1994); Richard Mollica et al., *The Dose-Effect Relationships Between Torture and Psychiatric Symptoms in Vietnamese Ex-Political Detainees and a Comparison Group*, 186 J. NERVOUS & MENTAL DISEASE 543 (1998).

139. E.g., Joseph A. Palermo, 'We Tortured Some Folks,' but 'That's Not Who We Are', HUFFINGTON POST (Dec. 12, 2014), http://www.huffingtonpost.com/joseph-a-palermo/cia-torture-report_b_6317672.html [http://perma.cc/TQ2S-TY36]; *Obama's Speech on Detainees and National Security*, WALL STREET J.: WASH. WIRE (May 21, 2009), <http://blogs.wsj.com/washwire/2009/05/21/obamas-speech-on-detainees-and-national-security/> [http://perma.cc/PNL7-7B3M].

140. See *supra* text accompanying notes 3–4.

takes control, turning the tables not just on terrorists but, symbolically, on all who disempower us. That this control is chimerical beyond the torturer's redoubt hasn't made it less appealing. The larger challenge for all who reject torture isn't to show that it doesn't "work"; it is to convince Americans that the torturer's brutality is a marker of weakness and fear, not national resurgence.